Supreme Court, U.S.
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NO. 85-442

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ROBERT ECKELS,
COUNTY COMMISSIONER,
HARRIS COUNTY, TEXAS,
Petitioner-Defendant,

v.

THE GREATER HOUSTON CHAPTER OF
THE AMERICAN CIVIL LIBERTIES
UNION, ET AL,
Respondent-Plaintiff.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

I. Whether the requirement of filing adequate notice of appeal pursuant to F.R.A.P. 3(c) is satisfied by: (1) the timely payment of appellate filing and docketing fees, (2) the simultaneous ordering of the trial transcript and timely filing of the Fifth Circuit's Appeal Information Sheet, coupled with (3) the admission by all concerned that both opposing counsel and the court had notice of what was being appealed and that the appeal was now going forward.

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

QUESTION PRESENTED

I. Whether the requirement of filing adequate notice of appeal pursuant

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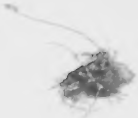
PARTIES TO THE PROCEEDINGS BELOW

The Petitioner-Defendant is Robert Eckels, County Commissioner for Harris County (Houston), Texas. The Plaintiffs-Respondents are the Greater Houston Chapter of the American Civil Liberties Union, Mr. Robert Binford, Mr. Douglas Griffith, and Mrs. Lillian Ducharme.



REFERENCE TO OPINIONS

The original opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported and is reproduced as Appendix "A".

The opinion of the United States Court of Appeals for the Fifth Circuit on panel rehearing and suggestion for rehearing en banc is reproduced as Appendix "B". The court's denial of said motions is reproduced as Appendix "C".

JURISDICTION

The judgment of the Court of Appeals dismissing the appeal was entered on March 18, 1985. Panel Rehearing and Suggestion for En Banc consideration were denied on May 28, 1985. This petition for certiorari was filed within ninety (90) days of that date. This

Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

FEDERAL RULE OF APPELLATE PROCEDURE 3(c). Content of the Notice of Appeal

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken . . .. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

FEDERAL RULE OF APPELLATE PROCEDURE 3(e): Payment of Fees

Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee

prescribed by the Judicial Conference of the United States, the latter to be reviewed by the clerk of the district court on behalf of the court of appeals.

STATEMENT OF THE CASE

i. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

On May 22, 1984, the district court filed findings of fact and conclusions of law in favor of the respondent-plaintiff (The A.C.L.U.). On July 5, 1984, the district court entered a final judgment against the defendant-petitioner and ordered the plaintiff-respondent to submit a memorandum on the motion for new trial. The petitioner filed a notice of appeal on July 17, 1984. The motion for new trial was denied on July 28, 1984, but on July 27, 1984, the petitioner filed a motion objecting to the allowance of attorneys'

fees in that the respondent's motion for such was out of time. To date there has been no ruling on this motion. Apparently, the court's order of July 24, 1984, crossed in the mail. The United States Court of Appeals for the Fifth Circuit, following full briefing of the merits by all parties and an amicus, on it's own motion concluded that no adequate notice of appeal was filed during the operative thirty (30) days following July 24, 1984, and therefore dismissed the appeal pursuant to Rule 4(a)(4) of the Federal Rules of Appellate Procedure (see Appendix A). Petitioner then filed a timely motion for rehearing and suggestion for rehearing en banc, both of which were denied on May 28, 1985.

ii. STATEMENT OF FACTS

This public interest case arose from

the respondant's suit against a county commissioner from Harris County, Texas for his construction of three (3) crosses and a Star of David in a park located in petitioner's district. The case involves first amendment establishment of religion issues and it is undisputed that such are of public importance.

After complete briefing by all parties on the merits, however, the Court of Appeals dismissed the appeal on its own motion finding no timely notice of appeal being filed. In spite of the fact that substantial compliance was demonstrated with F.R.A.P. 3's notice of appeal requirement, the Court denied the panel rehearing request.

Accordingly, in this petition we deal only with whether there was substantial compliance with the notice of appeal requirements during the

operative thirty (30) day period following July 24, 1984, and therefore invite this court for the first time to address F.R.A.P. 3(c) in light of the strict interpretation previously given by this court to F.R.A.P. 4(a)(4).

REASONS FOR GRANTING THE WRIT

I. In light of this Court's opinion in Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982), which held that there existed no judicial discretion to recognize a "premature" notice of appeal pursuant to F.R.A.P. 4(a)(4), it becomes imperative for this Court to clearly articulate the standards which would demonstrate compliance with the statutory notice of appeal requirements of F.R.A.P. 3(c). While Griggs, did indeed render ineffective "premature" notices of appeal, Justice Marshall noted in his

dissent--that the issue of subsequent proper compliance with F.R.A.P. 3(c) was not even addressed. This case now affords the Court that opportunity.

II. The Court below abused its discretion by not applying the required liberal construction to the petitioner's proper and timely attempt to notice the appeal. A proper notice of appeal in this case can be found from a series of operative acts, including the timely payment of filing fees.

The petitioner demonstrated the substantial equivalent of a notice of appeal being filed after the final order of July 24, 1984, in that the filing and docketing fees were paid on July 27, 1984, simultaneous with the ordering of the trial transcript and filing of the Fifth Circuit's Appeal Information

Sheet, which was then transmitted to opposing counsel and to the Fifth Circuit. Furthermore, counsel for the respondent was noticed on July 27, 1984, that the appeal was now going forward. While it is true that F.R.A.P. Rule 4(a)(4) was constricted by the 1979 amendments, at the same time F.R.A.P. 3 was liberalized by amending Rule 3(c) indicating that:

> an appeal shall not be dismissed for informality of form or title of the notice of appeal and 3(e), that upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the Court of Appeals. (The mandatory nature of the filing fee is also set out in the Fifth Circuit's LOC R.42.)

We believe this precise question is truly one of first impression. It is

true that the court no longer has discretion under F.R.A.P. Rule 4(a)(4) to consider the "premature" notice of appeal as timely, as it had done repeatedly before 1979, but that discretion should now be found in F.R.A.P. 3, when there exists a clear intent to take an appeal and the interests in "substantial justice" so warrant. In Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974), the Court recognized that the "notice of appeal requirement may be satisfied by any statement, made either to the district court or to the court of appeals, that clearly evidences a party's intent to appeal. Judge Wisdom, in Cobb, also pointed out that "the courts of appeal have discretion when the interests of substantial justice require it, to disregard irregularities in the form or procedure for filing a notice of appeal." Cobb at

pg. 44. (See also, the new F.R.A.P. 3(c) which states in part--"An appeal shall not be dismissed for informality of form or title of the notice of appeal.") It is in this light that the petitioner would seek the invocation of this Court's discretion to serve the interests of substantial justice by granting the writ.

A. There are two operative acts which clearly manifested a present intent to go forward with this appeal after the order of July 24, 1984:

1. The Fifth Circuit Appeal Information Sheet was timely filed on August 20, 1984, and therefore within the operative thirty (30) days from the final order of July 24, 1984, and it alone satisfies the elements of a notice of appeal under F.R.A.P. 3(c).

2. This notice that the appeal was now going forward was triggered by the payment of the docket and filing fees on July 27, 1984, which was also

> the same day the transcript was ordered This notice not only went to all parties as well as the court, but it listed the names of the petitioner and his attorney as well as the opposing party or respondent and its attorney, Mr. Stefan Presser. Furthermore, it was signed by the petitioner's attorney wherein he guaranteed payment of the transcript, and identified the district court cause number.

The filing of the Appeal Information Sheet and the simultaneous payment of the requisite fees demonstrate that a clear intent to initiate the appeal was demonstrated three (3) days after the final order of July 24, 1984, and that the transcript was ordered and docketing and filing fees were all paid on the same day, July 27, 1984. It was only after the final order was entered that these present manifestations of intent to appeal were accomplished.

The Fifth Circuit has recently entertained two cases pertaining to the interpretation of "substantial equivalent" of a notice of appeal. In Alamo Chemical Transp. Co. v. M/V Overseas Valdes, 744 F.2d 22 (5th Cir. 1984), the court held that a "mere request to the court for an enlargement of time in which to file an appellate brief does not constitute the requisite notice of appeal required by F.R.A.P. Rule 3(c). Earlier, in Van Wyk El Paso Investment, Inc. v. Dollar-Rent-A-Car Systems, Inc., 719 F.2d 806 (5th Cir. 1983), this Court rejected a "Form of Appearance of Counsel," and three (3) communications from the clerk of the district court and the court of appeals to the parties as being a sufficient notice of appeal. In Van Wyk, the Court also pointed out:

> this Court has recognized that the timely filing of a document

> which is the equivalent of a notice of appeal will satisfy the requirement of Rule 3. (Stevens v. Heard, 674 F.2d 320 (5th Cir 1982)). The document should accomplish the dual objectives of (1) notifying the court and (2) notifying opposing counsel of the taking of an appeal.

Both Alamo and Van Wyk, however, are distinguishable from the case at bar. Both cases involved the passing of various documents which still relied upon the premature notice of appeal (emphasis ours). The present case deals with the paying of the docket and filing fees together with the ordering of the appellate transcript on the operative day of July 27, 1984, at which time the petitioner clearly evidenced the present intent to begin the appeal, and such is demonstrated by the filing of the Appeal Information Sheet on August 20, 1984.

In Alamo, the Court merely had before it appellant's reliance on an

extension of time; there was never a clear manifestation of a new attempt to notice the appeal after the final order. Similarly, in Van Wyk, the "Form of Appearance of Counsel" did not even inform the Court of who the parties were, of who was appellant or appellee, nor did it even mention an order or judgment appealed from.

In contrast, by looking at the pivotal date of July 27, 1984, we find the petitioner waiting until a final order which was entered on July 24, 1984, and then paying the filing fee and docketing fee, together with the payment of the transcript costs as evidenced by the Appeal Information Sheet which was timely filed. We need not rely upon the premature notice of appeal at all in this case, for the payment of fees and the Appeal Information Sheet set into motion the events of this appeal. This

is where the court below abused its discretion under F.R.A.P. 3(c).

Indeed, the payment of the fees and the Appeal Information Sheet meet the dual-test as set out in Van Wyk by (1) notifying the court, and (2) notification of opposing counsel of the taking of an appeal. Not only did appellant's counsel speak personally to counsel for the appellees' regarding payment of the docketing fees and filing fees, but opposing counsel was also sent a copy of the signed Appeal Information Sheet. The respondents do not contest notice.

In its opinion denying panel rehearing, the Fifth Circuit apparently agreed with petitioner in all respects except where the court stated:

> The Appeal Information Sheet relied on by Eckels does not designate in any fashion "what judgment, order or part" is appealed from. It is clear that Eckels opponent and the court were on notice of the

appeal in this case, but we are bound by the requirement of Rule 3(c) and Van Wyk. (See Appendix "B".)

The Court's order of July 24, 1984, merely maintained the status quo in this case. Nothing in that order modified the final judgment entered on July 5, 1984. All parties and the court were put on notice by the Appeal Information Sheet that the final judgment was the subject of the appeal. If, in fact, the court's order of July 24, 1984, had modified the judgment, the appellee may well be correct in pointing to potential confusion over whether the judgment or the subsequent order was the subject of the appeal. There was certainly no confusion in this case, however, for all parties knew on July 27, 1984, that the appeal was now going forward.

It this court is concerned that the order and not the judgment should be the judicial act from which we appeal, we

would ask that the court consider that the order merely maintained the status quo. This case fits exactly the teachings of Professor Moore where he instructed that the Courts of Appeal should give liberal interpretation to the requirement of F.R.A.P. 3(c) when he wrote:

> The Rule us now well settled that a mistake is designating the judgment or in designating the part appealed from--should not result in the loss of the appeal so long as the intent to appeal from a specific judgment can be fairly inferred from a notice and the appellee is not misled (See 9. J. Moore, Moore's Federal Practice ¶ 203.18 at 3 - 7 (2d Ed. 1983) (emphasis ours).

The respondents have conceded that they were not misled. This court may look to either the payment of fees, the filing of the Appeal Information Sheet, or to both, and properly "infer" that the order which did not modify the final judgment in this case is the proper

subject of this appeal. There is actually no other reasonable "inference" that could be drawn from these operative acts. We ask this Court to grant the writ and breathe meaning to F.R.A.P. 3(c).

B. In the alternative, and without reliance on the previous argument, the "timely" payment of the requisite docketing and filing fees was a mandatory act under the 1979 amendments to Rule 3(e); therefore the "premature" notice of appeal became effective.

It is undisputed that on July 27, 1984, three days after the final order was entered by the trial court, the appellant paid the docketing and filing fees as required by this Court. The earlier notice of appeal had no force or effect until the payment of the

docketing and filing fees. It was the payment of the relevant fees which breathed life into this appeal.

As the court substantially relied upon the 1979 amendment to F.R.A.P. Rule 4(a)(4) in Griggs to summarily dismiss the appeal in that case, it should now examine the simultaneously enacted amendments to F.R.A.P. Rule 3 to discover that the payment of fees is now a mandatory act.

F.R.A.P. Rule 3(e), which was added in 1979, provided that "upon the filing of any separate or joint notice of appeal" from the district court, the appellant must pay to the clerk of the district court "such fees as are established by the statute" and also the docket fee prescribed by the Judicial Conference of the United States.

Before the 1979 amendments, the Rules made no mention of the fees

prescribed. Under the old Rule 12(c), it was provided that on motion to dismiss for failure to cause timely transmission of the record to pay the docket fee, the case would be docketed but the appellant would not be permitted to respond without payment of the fee (See 9 J. Moore, Moore's Federal Practice § 212.03 (2d Ed. 1983)).

Under the 1979 amendments however, it is clear that the fees are due and payable upon the filing of the notice of appeal. "Since docketing now follows the filing of the notice of appeal without further act of the appellant, he is required to pay the docket fee at the time he filed the notice of appeal." (See 9 J. Moore, Moore's Federal Practice § 203.07 (2d Ed. 1983)). In essence, the premature notice of appeal was held in abeyance until the operative, mandatory act of

payment of the required fees was acomplished. The payment was the catalyst causing the appeal to go forward. It is no coincidence that this mandatory act occured in a timely way, three days after the final order and thus preserving a proper notice of appeal which evidenced a present intent to go forward with the appeal.

Again, petitioner is aware of cases such as Van Wyk El Paso Investment, Inc. v. Dollar-Rent-A-Car Systems, Inc., 719 F.2d 806 (5th Cir. 1983), and Alamo Chemical Transp. Co. v. M/V Overseas Valdes, 744 F.2d 22 (5th Cir. 1984), but both are distinguishable due to the fact the premature notices of appeal were also prematurely paid and thus, there was not present the crucial mandatory element of payment during the proper time frame for appeal.

The Fifth Circuit's Court's Local

Rule 42, also supports the mandatory nature of the payment of fees, for on July 19, 1984, counsel for appellant received from this court a letter indicating that:

> The court has received a copy of the notice of appeal. Pursuant to the recent amendments to F.R.A.P 3(e), the Court of Appeals $65.00 filing fee must be paid to the District Clerk with the notice to us within ten days from this date; otherwise, the appeal will be dismissed pursuant to Local Rule 42.

Accordingly, the changes to Rule 3, together with the Fifth Circuit's Local Rule 42, mandate that the payment of proper fees is a requisite act to proper notice of appeal. It would also follow that even if a premature notice under F.R.A.P. Rule 4(a)(4) was present here, it simply could have no effect in any case until the mandatory act of payment of the fees. The payment of the fees during the thirty (30) days following

the Judge's final order of July 24, 1984, was an act that not only triggered this appeal, it was also a mandatory act under the amended F.R.A.P. Rule 3(e) and the Local Rule 42 of the Fifth Circuit.

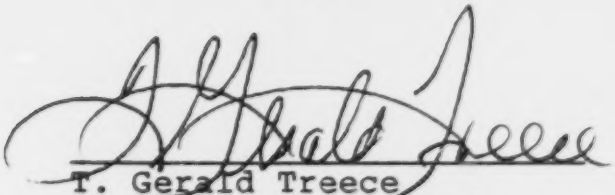
The later order of July 24, 1984, merely maintained the status quo in this case. Accordingly, on July 27, 1984, the Court and all parties clearly knew the appeal was going forward and that the attack was now on the final order which did not modify judgment. Admittedly, this presents questions of first impression and consideration of these issues are mandated by the 1979 amendments to F.R.A.P. 3.

CONCLUSION

The petitioner respectfully requests this Court to grant certiorari to review the significant federal issues raised under F.R.A.P. 3 and to provide clear

guidance to the federal judiciary as to the standards for notices of appeals in light of Griggs.

August 22, 1985
DATE



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APPENDIX A

GREATER HOUSTON CHAPTER OF
THE AMERICAN CIVIL LIBERTIES
UNION, et al., Plaintiffs-Appellees,

v.

Robert ECKELS, Defendant-Appellant

United States Court of Appeals,
Fifth Circuit

March 18, 1985.

Suit was brought against county commissioner seeking removal of religious symbols erected in public park. The United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., 589 F.Supp. 222, entered judgment against county commissioner, and appeal was taken. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that judgment was not intended to dispose of motion for new trial, where District Court ordered parties to brief the matter on same day that the judgment was entered, and court subsequently considered and made a

decision on motion, and thus, since no notice of appeal was filed following the entry of decision on new trial motion, Court of Appeals was without jurisdiction of appeal.

Appeal dismissed.

1. Federal Courts - 668

If defendant county commissioner's motion for a new trial was properly made, notice of appeal filed prior to decision on that motion was completely without effect.

2. Federal Civil Procedure - 2366

Although defendant county commissioner's motion for a new trial was filed prior to the formal entry of judgment, it was timely and proper. Fed. Rules Civ. Proc. Rule 59(b), 28 U.S.C.A.

3. Federal Courts - 668

Entry of judgment was not intended

to dispose of defendant county commissioner's early motion for new trial, where district court ordered parties to brief the matter on same day that judgment was entered, and court subsequently considered and made a decision on the motion, and thus, since no notice of appeal was filed following entry of decision on that new trial motion, Court of Appeals was without jurisdiction of appeal. F.R.A.P. Rule 4(a)(4), 28 U.S.C.A.

4. Federal Courts - 668

Requirement of a timely notice of appeal may be satisfied by filings which are substantially equivalent to a notice of appeal. F.R.A.P. Rule 4(a)(4), 28 U.S.C.A.

5. Federal Courts - 668

Record contained nothing following denial of defendant county commis-

sioner's early motion for new trial which could function as a substantial equivalent of formal notice and satisfy requirement of timely notice of appeal. F.R.A.P. Rule 4(a)(4), 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Texas.

Before, GEE, JOHNSON and DAVIS, Circuit Judges.

W. Eugene Davis, Circuit Judge:

This appeal arises from a successful challenge by the ACLU to defendant Robert Eckels's placing of three crosses and a star of David in a county-owned park in Harris County, Texas. Since no timely notice of appeal was filed, we are without jurisdiction and therefore dismiss the appeal.

I.

The procedural chronology which

compels this dismissal is as follows: the district court filed findings of fact and conclusion of law in favor of the ACLU on May 22, 1984, 589 F.Supp. 222. On June 2, Eckels filed a motion for a new trial. On July 5, the district court entered final judgment, and ordered that counsel submit memorandum on the motion for new trial. Eckels filed a notice of appeal from the July 5 final judgment on July 17. The motion for new trial was denied on July 24, and no notice of appeal was filed after that date.

Federal Rule of Appellate Procedure 4(a)(4) sets forth the time limits for filing a notice of appeal following a motion for new trial:

> (4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party ... (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or

> denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

The sole notice of appeal in this record was filed prior to the entry of the decision on Eckels's motion for a new trial. In Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982), a case involving an identical chronology, the Supreme Court interpreted Rule 4(a)(4) to mean precisely what it says:

> Under the plain language of the current rule a premature notice of appeal "shall have no effect"; a new notice of appeal "must be filed." In short it is as if no notice of appeal were filed at all, and if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act.

459 U.S. at 61, 103 S.Ct. at 403

[1-5] If Eckels's motion for a new

trial was properly made, the notice of appeal filed prior to the decision on that motion is completely without effect. Since we notice the jurisdictional flaw without benefit of briefing by the parties, we have examined the question whether the motion was timely with some care. We conclude that although the motion was filed prior to the formal entry of judgment, it was timely and proper. Rule 59(b) of the Federal Rules of Civil Procedure provides that "[a] motion for new trial shall be served not later than ten days after the entry of judgment." This language does not explicitly require that a motion for new trial be made after judgment is entered, and it has not been interpreted to include this requirement. In United States v. Pan American World Airways, 382 U.S. 25, 86 S.Ct. 153, L.Ed.2d 21 (1965), a motion

to amend the findings of fact and conclusions of law or for a new trial was filed six weeks prior to the entry of final judgment. An order denying the motion was entered on November 16, and notice of appeal was filed January 13, 1961. Since an office of the United States was a party to the action, the time for taking an appeal was sixty days. We concluded that the notice of appeal was timely:

> The running of the time for taking an appeal is suspended until disposition is made of timely motion to amend or make additional findings of fact.... Where, as in the case here, the motion presented a substantial question and the motion is not disposed of, either expressly or by necessary implication, by the judgment, the rule is applicable although the motion was made before but not overruled until after the judgment.

299 F.2d at 76. United States v. Pan American World Airways was later reversed by the Supreme Court on another

point, but its reasoning with regard to the timeliness of an early motion for a new trial is persuasive and is the accepted view.[1] In this case the entry of judgment obviously was not intended to dispose of the motion for new trial, since the district court ordered that parties to brief the matter on the same day that the judgment was entered, and the court subsequently considered and made a decision on the motion. Since no notice of appeal was filed following the entry of the decision on the new trial motion, we are without jurisdiction of this appeal.[2]

DISMISSED.

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1. See Calculators Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332, 1335 (9th Cir. 1983); American Security Bank v. John Y. Harrison Realty, 670 F.2d 317, 312 (D.C. Cir. 1982); Director of Revenue v. United States, 392 F.2d 307 (10th Cir. 1968); 9 J. Moore, Moore's Federal Practice § 204.12(4) (2 Ed. 1983).

2. The requirement of timely notice of appeal may be satisfied by filings which are substantially equivalent to a notice of appeal. E.g., Alamo Chemical Transportation Co. v. M/V OVERSEAS VALDES, 744 F.2d 22 (5th Cir. 1984); Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974). This record contains nothing following the July 24 denial of the motion for new trial which could function as a substantial equivalent of formal notice.

APPENDIX B

GREATER HOUSTON CHAPTER OF
the AMERICAN CIVIL LIBERTIES
UNION, et al., Plaintiffs-Appellees,

v.

Robert ECKELS, Defendant-Appellant.

No. 84-2412.

United States Court of Appeals,
Fifth Circuit

May 28, 1985.

Suit was brought against county commissioner seeking removal of religious symbols erected in public park. The United States District Court for the Southern District of Texas, Carl O. Bue., Jr., J., 589 F.Supp. 222, entered judgment against county commissioner, and appeal was taken. The Court of Appeals, 755 F.2d 426, dismissed the appeal. On petition for rehearing, the Court of Appeals held that even though appellee and court were on notice of appeal, payment information sheet did not amount to the substantial

equivalent of a "notice of appeal," in that appeal information sheet did not designate in any fashion what judgment, order, or part was appealed.

Petition denied.

6. Federal Court - 666

Even though appellee and court were on notice of the appeal, payment of filing and docketing fees and filing of appeal information sheet did not amount to the substantial equivalent of a "notice of appeal," in that appeal information sheet did not designate in any fashion what judgment, order, or part was appealed. F.R.A.P. Rule 3(c), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the Southern District of Texas.

APPENDIX C

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BAND

(Opinion of March 18, 1985, 5th Cir., 1985, 755 F.2d 426)

Before GEE, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

In his petition for rehearing, Eckels argues that the payment of filing and docketing fees on July 27, 1984, plus the filing of an "Appeal Information Sheet" on August 20, 1984, amount to the "substantial equivalent of a notice of appeal."

In Van Wyk El Paso Investment, Inc. v. Dollar-Rent-A-Car-Systems, Inc., 719 F.2d 806 (5th Cir. 1983), we stated in response to the argument that a "Form for Appearance of Counsel" constituted the equivalent of a notice of appeal:

> Nor can the Form for Appearance of Counsel be construed as the equivalent of a notice of an

> independent appeal. [Federal Rule of Appellate Procedure 3(c)] dictates that '[t]he notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.' The Form for Appearance of Counsel which it filed fails to indicate whether Dollar-Rent-A-Car is appellant or appellee. It does not refer to the final order of the trial court which is the subject of the appeal. It is a standard form that signifies no more than a usual step to tell this court who sponsors the premature notice of appeal which Rule 4(a)(4) says 'shall have no effect.'

719 F.2d at 808.

The Appeal Information Sheet relied on by Eckels does not designate in any fashion what "judgment, order or part" is appealed from. It is clear that Eckels's opponent and the court were on notice of the appeal in this case, but we are bound by the requirement of Rule 3(c) and Van Wyk. "A liberal construc-on of the requirements of Rule [3(c)]

cannot be allowed to nullify the plain provision of Rule 4(a)(4) that a premature notice of appeal 'shall have no effect.'" Van Wyk, 719 F.2d at 807. The petition for hearing is therefore DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.